No. 80-1217

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF GALLUP, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Commission's determination that the contract for the sale of electricity involved in this case contemplated changes in rates under the "just and reasonable" standard of the Federal Power Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 628 F. 2d 1267. An earlier opinion of the court of appeals (Pet. App. 10a-23a) is reported at 557 F. 2d 227. The orders of the Federal Power Commission and its successor, the Federal Energy Regulatory Commission (Pet. App. 24a-72a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1980. A petition for rehearing was denied on October 21, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, are set forth at Pet. App. 73a-77a.

STATEMENT

The Public Service Company of New Mexico (PNM) is an electric utility that sells electricity for resale to petitioner, the City of Gallup, New Mexico. These sales are subject to the jurisdiction of the Commission under Subchapter II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

Under Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d), utilities may unilaterally change their rates by filing with the Commission notification of such change. If properly filed, the rates may take effect, subject to suspension by the Commission, prior to the Commission's determination of their lawfulness. Section 206(a) of the Act, 16 U.S.C. 824e(a), empowers the Commission, on its own motion or on complaint, to impose, after a hearing, just and reasonable rates of prospective applicability.

In 1975, pursuant to Section 205 of the Act, PNM filed with the Commission a revised rate schedule proposing increased charges to Gallup. Gallup objected, arguing that the unilateral rate increase was precluded by its contract with PNM and this Court's decisions in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (Pet. App. 45a-46a). In *FPC* v. *Sierra Pacific Power Co.*, *supra*, this Court held that a utility may not act unilaterally to increase rates during the term of a fixed rate contract by filing for a rate change pursuant to Section 205 of the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, stands for the same proposition with respect to sales of natural gas under the identical terms of Section 4 of the Natural Gas Act, 15 U.S.C. 717c. Both decisions further recognize, however, that the Commission may change the agreed-upon fixed rate if it is "so low as to adversely affect the public interest." *Sierra*, *supra*, 350 U.S. at 355; see *Mobile*, *supra*, 350 U.S. at 344-345.

The PNM-Gallup contract contained a provision entitled "Change In Rate," which expressly stipulated that a proposed rate increase by PNM "for any reason whatsoever" (except for fuel costs or tax adjustments) shall give Gallup the option of terminating the agreement (Pet. App. 84a). Another provision made the contract subject to "such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications" (*id.* at 107a).

The Commission determined that the PNM-Gallup contract did not permit the unilateral filing by PNM of new rates under Section 205 of the Federal Power Act, but that it did envision rate changes authorized by the agency (Pet. App. 45a-49a). The Commission thereupon instituted a Section 206(a) proceeding to fix a just and reasonable rate of prospective applicability, expressly noting that this proceeding would not entail the heavy burden of proof required under the *Sierra* and *Mobile* decisions (Pet. App. 49a & n.5).

Both PNM and Gallup petitioned for review in the court of appeals. With respect to PNM's claim that its contract with Gallup permitted unilateral rate changes, the court of appeals affirmed the Commission's order, concluding that "the reference [in the contract] to changes ordered by a regulatory body * * * points toward a change after a § 206 proceeding, not a § 205 unilateral filing" (Pet. App. 20a-21a).[1]

In July 1978, following the Section 206 proceeding, the Commission approved settlement rates over Gallup's objection (Pet. App. 67a-69a).[2]

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[1]The court of appeals dismissed, as premature, Gallup's claim that the Commission had erroneously determined that the "just and reasonable" standard of proof, expressly sanctioned under the Act (16 U.S.C. 824e(a)), would apply in the forthcoming Section 206 proceeding (Pet. App. 21a-23a).

[2]Gallup objected notwithstanding the fact that the settlement rates were in large part based on Gallup's own figures (Pet. App. 7a).

Meanwhile, a few months earlier, PNM had proposed an additional increase in Gallup's rates pursuant to Section 206 of the Act. In June of 1978 the Commission instituted another Section 206 proceeding to determine the just and reasonable charges to Gallup. After reviewing the same contract that it had considered in the prior Section 206 proceeding, the Commission again concluded that the strict "public interest" burden of proof established in *Mobile* and *Sierra* should not apply to rate changes under the contract (Pet. App. 24a-33a). The Commission explained (*id.* at 43a) that, in its view, the parties had agreed contractually not to a specific rate but to "a rate changeable in a specific manner." The Commission concluded (*id.* at 44a; footnote omitted) that the clause in the contract providing

> that the rate shall be subject to change by order issued by the regulatory body having jurisdiction * * * clearly indicated that the parties did not intend to allow a change in rates by unilateral filings under Section 205, but only by "order" of the Commission, i.e. a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunicated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings.

Gallup's petitions for review of the Commission's determinations in both Section 206 proceedings were consolidated for consideration in the court of appeals. That court affirmed the Commission's interpretation of the contract. It held that the contract was not a "fixed rate" contract such that no change in the rate was permissible unless the exist-

ing rate was found to be so low as to adversely affect the public interest (Pet. App. 5a-7a).[3]

ARGUMENT

The court of appeals applied well established legal principles in affirming the Commission's ruling that the PNM-Gallup contract contemplated rate changes upon application of the "just and reasonable" test of Section 206 of the Act, rather than under the stricter *Mobile-Sierra* standard. The decision below does not conflict with any decision of this Court or any other court. Accordingly, further review is not warranted.

1. In the *Mobile-Sierra* line of cases this Court established two separate but related principles. First, a utility subject to regulation under the Federal Power Act may not abrogate a contractual obligation to provide service at a fixed rate by a unilateral filing for a rate increase with the Commission. Second, the Commission may not on its own motion change a contractually fixed rate absent a finding that that rate is "so low as to adversely affect the public interest." *Sierra*, *supra*, 350 U.S. at 355.[4]

The decision in this case does not violate that doctrine. The court of appeals simply affirmed the Commission's determination that the PNM-Gallup contract was not a fixed rate contract since it contemplated "a change in rates

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[3]The court observed (Pet. App. 5a-6a) that, unlike the contract involved in *Sierra*, which provided only for changes in rates by the California regulatory agency, the PNM-Gallup contract provided for rate changes as ordered by any legally constituted regulatory body with jurisdiction over the sales.

[4]In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), this Court clarified the *Mobile-Sierra* doctrine by explaining that when the underlying contract does not establish a fixed rate the utility is free to seek a unilateral rate increase under the statute.

prospectively after a Section 206(a) proceeding" (Pet. App. 44a; footnote omitted). Petitioner takes issue with that determination, arguing that the language in its contract is substantially similar to the language of the contract involved in *Sierra* (Pet. 11). This contention is groundless. Petitioner ignores Article II of its contract, entitled "Change in Rate" (Pet. App. 84a), which expressly refers to rate changes during the contract term and which would be entirely superfluous if the contract were read to impose fixed rates. The contract involved in *Sierra* did not contain a comparable provision (see Pet. App. 108a-118a). Furthermore, unlike the PNM-Gallup contract, the *Sierra* contract provided only for rate changes by the California agency, and thus, as to any rate changes authorized by federal agencies, the *Sierra* contract could quite properly have been deemed to impose a fixed rate (see Pet. App. 6a). Here, on the other hand, it was clearly envisioned by the parties to the contract that the Commission—as a "legally constituted regulatory body" with jurisdiction over the sales (Pet. App. 107a)—would have authority to direct rate changes. In short, as the court below held, the *Sierra-Mobile* doctrine has no application to this case.

2. There is no merit to petitioner's further argument (Pet. 12) that the decision below conflicts with several decisions of the District of Columbia Circuit. In essence, petitioner argues that the D.C. Circuit has concluded that once it is determined that a contract does not permit unilateral rate changes under Section 205, then the strict "public interest" standard must necessarily apply in any Section 206 proceeding.[5] But the cases on which petitioner relies do not so hold.

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[5]Petitioner contends (Pet. 14) that, as construed by the D.C. Circuit, "the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures."

In both *Papago Tribal Utility Authority* v. *FERC*, 610 F. 2d 914 (D.C. Cir. 1979), and *City of Oglesby* v. *FERC*, 610 F. 2d 897 (D.C. Cir. 1979), the court of appeals stated that it was not deciding whether "the rigorous *Sierra* burden of proof must be employed * * * ." *Papago, supra*, 610 F. 2d at 930 n.127; *Oglesby, supra*, 610 F. 2d at 901 n.20. Similarly, in *Boroughs of Chambersburg* v. *FERC*, 580 F. 2d 573 (D.C. Cir. 1978), the question of the appropriate burden of proof in a Section 206 proceeding was not addressed. Moreover, the decision in *Richmond Power & Light Co.* v. *FPC*, 481 F. 2d 490 (D.C. Cir.), cert. denied, 414 U.S. 1068 (1973), is fully consistent with the decision below. In *Richmond, supra*, 481 F. 2d at 497, the D.C. Circuit expressly recognized that parties could agree by contract to a rate that, although not fixed for the contract term, could not be unilaterally changed, *i.e.*, "a rate changeable in a specific manner." To that extent, *Richmond* refutes petitioner's contention (Pet. 14) that "all contracts not unilaterally modifiable" are "fixed rate" contracts to which the *Sierra* decision applies.

Finally, in *City of Marceline* v. *FERC*, No. 79-1740 (D.C. Cir. June 21, 1980), the burden of proof question presented here was presented to the District of Columbia Circuit. The court there affirmed without opinion the Commission's decision that a contract, the terms of which were substantially the same as those at issue here, did not permit unilateral rate changes but did contemplate that the rates could be changed during the contract term pursuant to Section 206 under the "just and reasonable" standard of proof.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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